



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

FINAL

Police Officer Rostislav Kipervaser :

ORDER

Tax Registry No. 950687 :

OF

PSA 2 :

DISMISSAL
-----X

Police Officer Rostislav Kipervaser, Tax Registry No. 950687, having been served with written notice, has been tried on written Charges and Specifications numbered 2020-22653, as set forth on form P.D. 468-121, dated September 10, 2020, and after a review of the entire record, Respondent is found Guilty.

Now, therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Rostislav Kipervaser from the Police Service of the City of New York.


DERMOT F. SHEA
POLICE COMMISSIONER

EFFECTIVE: 9/27/21

COURTESY • PROFESSIONALISM • RESPECT

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POLICE DEPARTMENT

August 12, 2021

-----X
In the Matter of the Charges and Specifications :

- against - :

Police Officer Rostislav Kipervaser :

Tax Registry No. 950687 :

PSA 2 :

Case No.

2020-22653

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Andrew Quinn, Esq.
The Quinn Law Firm
399 Knollwood Road, Suite 220
White Plains, NY 10603

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

COURTESY • PROFESSIONALISM • RESPECT

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CHARGES AND SPECIFICATIONS

1. Said Probationary Detective Rostislav Kipervaser, while assigned to Narcotics Borough Bronx, on or about September 4, 2020, at about 1330 hours, while off-duty and at the Home Depot, located at [REDACTED], New York, wrongfully stole property from said store, including a Dyson vacuum cleaner and various tools.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

N.Y.S. Penal Law Section 155.25
(Petit Larceny)

2. Said Probationary Detective Rostislav Kipervaser, while assigned to Narcotics Borough Bronx, on or about September 4, 2020, having been notified by the New York State Police that he was the subject of a criminal investigation, wrongfully failed to notify the Internal Affairs Bureau, as required.

P.G. 207-21, Page 1, Paragraph 1

ALLEGATIONS OF CORRUPTION AND
OTHER MISCONDUCT AGAINST
MEMBERS OF THE SERVICE
COMPLAINTS

3. Said Probationary Detective Rostislav Kipervaser, while assigned to Narcotics Borough Bronx, on or about September 4, 2020, wrongfully possessed stolen property, including a Dyson vacuum cleaner and various tools, taken from the Home Depot, located at [REDACTED], New York.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

N.Y.S. Penal Law Section 165.40
(Criminal Possession of Stolen
Property in the Fifth Degree)

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 30, 2021.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Donald Cox as its witness. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police

Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of the charged misconduct and recommend that he be DISMISSED from the New York City Police Department.

ANALYSIS

The following is a summary of the facts which are not in dispute. On September 4, 2020, Respondent, while off-duty, entered a Home Depot store located at [REDACTED], [REDACTED], New York. While at the store, he came to the attention of Donald Cox, a Loss Prevention Officer employed by Home Depot. Cox first observed Respondent in Aisle 4, as Respondent appeared to be selecting a Dyson vacuum for purchase (T. 45). Cox noticed three identical vacuums on the floor; two of the vacuums bore security devices on them, which he described as a "spider wrap," and one did not (T. 12-13, 45). He observed Respondent select the vacuum package without the security device and then place it in his cart (*Id.*). Cox testified that the purpose of the "spider wrap" security device is to trigger an alarm if someone attempts to remove the item from the store (T. 12, 45, 83). The device consists of two black wires that wrap around the length and width of the package, connected to a plastic disk (T. 71, 81-82). The security devices are intended to be removed by the cashier when the customer pays for his items (T. 82-83).

Cox continued surveilling Respondent, who moved through the store and placed other items in his cart (T. 14). Among the other things Respondent selected was a Dewalt car battery charger (T. 15). Cox observed Respondent take some time to examine the charger before placing it in his cart (*Id.*). He followed Respondent for approximately five to eight minutes before Respondent entered the self-service check-out area (*Id.*, 48). The check-out area was under video surveillance; the parties stipulated to the admission of Department Exhibit 1, a video recording of Respondent's activities at the self-service register on September 4, 2020, into

evidence (T. 15-16). The store has signage posted that shoplifters will be prosecuted and that the store utilizes video surveillance (T. 49).

The self-service register at Home Depot is configured to permit a customer to use a handheld scan "gun," which scans the product code on the packaging of an item, causing the price and a picture of the scanned object to be displayed on a monitor. The register is configured to issue an audible "beep" each time an item is scanned. Even if the audible tone fails to sound, or is not detected by the customer, the display of the product and price still appear on the register monitor. If the register seems to malfunction (*e.g.*, either the scanner, display or both, fail to operate; the total price is greater than the value of the items scanned, or the total cost is less than the value of the items scanned), the customer has the option of seeking assistance from a customer service representative. A customer service representative is assigned to the self-service check-out area to assist customers. The self-service register does not "time-out," and the product list remains on the monitor indefinitely until the check-out process has been completed (T. 19-22, 44, 50, 52, 68-69, 75-76, 80-81, 90).

Cox took up a position near the register and observed Respondent use the scanning "gun" to scan several items he removed from his cart. Respondent eventually inserted a credit card in the card machine attached to the cash register and paid for particular items. Cox was able to observe the objects Respondent scanned at the register from his position. While he watched Respondent scan several items that came up on the register monitor, he did not observe Respondent scan either the Dyson vacuum or the Dewalt battery pack (T. 23-24, 51-54, 62). Cox testified that he saw the monitor display a list of the items Respondent scanned, as well as a total price for those items (T. 72). According to Cox, Respondent would have been able to review a complete list of the things he scanned on the monitor before inserting his credit card for payment (T. 73).

Respondent did not scan, and did not pay for, the following four items: (1) a Dyson Cyclone V10 Motorhead cordless stick vacuum cleaner, list price \$349.00; (2) a Dewalt 1400 amp digital power station, list price \$199.00; (3) a Husky 50-foot extension cord, list price \$19.88; and (4) a Gen25 25 foot 30 amp Ridgid Gen cord, list price \$69.97 (T. 18, 79-80; Dept. Ex. 3). The pre-tax subtotal of these items was \$637.85; with tax, the total was \$850.73 (T. 34; *Id.*). Cox testified that he never saw, either during his monitoring of Respondent at the self-service register or during his in-court review of the video in Department Exhibit 1, Respondent touch the box containing the Dyson vacuum (T. 78). The parties stipulated that the items Respondent did pay for totaled \$100.42 (T. 140).

At approximately 1410 hours, as Respondent attempted to leave the store, Cox had a conversation with him, the details of which are in dispute. It is undisputed that he and Respondent then went to Cox's Asset Protection office, where he had a further discussion with Respondent and completed some forms regarding the incident. Cox then had a telephonic conversation with his supervisor before he gave Respondent a Notice informing him that he was prohibited from entering any Home Depot store for three years; Respondent signed that form, which Cox witnessed (Dept. Ex. 4).

Respondent left the store and eventually reported for duty that afternoon (T. 108, 127). At approximately 1400 hours, a State Police officer visited Cox's security office on an unrelated matter. Inside the office, he noticed the Dyson vacuum and the Dewalt power pack which had been in Respondent's cart; he asked Cox about them and was informed of what had transpired earlier in the day between Cox and Respondent. When Cox told him that there had been no arrest, the State Police officer asked to review the security video. After reviewing the video surveillance, the police officer informed Cox that he would pursue a prosecution. The police

officer took Respondent's pedigree information from Cox and began processing the information (T. 39-41).

Later that afternoon, Respondent, while on-duty, received a telephone call from an individual identifying himself as a State Police investigator; this individual informed him that the State Police were investigating the incident he was involved in earlier that day and wished to interview him. Respondent then had a telephonic conversation with a union delegate; he admitted that he never made a notification to the Internal Affairs Bureau. Several hours later, Respondent's supervisor directed him to return to their command because the Duty Captain needed to interview him (T. 108-109).

Department Exhibit 1 is a video recording captured by an overhead surveillance camera inside the [REDACTED] Home Depot store, specifically the self-checkout area (Dept. Ex. 1). The recording captures Respondent waiting in line for a self-service check-out machine (0:00:11-0:00:38). Respondent then walks toward a vacated self-service register, where he remains for approximately 1½ minutes (0:00:39-0:02:10). The following is a summary of relevant events captured on the video:

0:00:38-0:00:49	Respondent walks toward an open cash register with his shopping cart.
0:00:50	Respondent reaches for a scanner gun with his left hand.
0:00:50-0:01:02	Cox walks through the center of the self-service check-out area, turns his head to the right in the direction of Respondent, then takes up a surveillance position near the front of the store, facing Respondent at an 11 o'clock position.
0:00:51-0:01:41	Respondent appears to scan several items. The cash register monitor changes from the home screen to a list of the things scanned, with their prices and a sub-total for all scanned items.
0:01:42-0:01:46	Respondent flips a yellow package containing the Dewalt battery charger in his hands but does not appear to scan it.

0:01:47-0:01:59	Respondent moves his right hand toward the display, places the scanner on the counter, then removes a credit card from his pocket, which he inserts into the credit card terminal with his left hand.
0:02:00-0:02:05	Respondent removes the credit card with his left hand, then bends over to retrieve his receipt from the register.
0:02:06-0:02:08	Respondent takes his receipt from the register with his right hand.
0:02:09-0:02:17	Respondent moves behind his shopping cart, then pushes it from the self-checkout area toward the store exit. Cox leaves his surveillance position, walks toward the self-checkout area, then turns sharply to his left and follows Respondent outside.

(Dept. Ex. 1).

At issue, in this case, is whether Respondent: (1) stole property from Home Depot; (2) failed to make a timely notification to the Internal Affairs Bureau; and (3) possessed stolen property. The following is a summary of the relevant trial evidence.

Respondent testified that on September 4, 2020, he was scheduled to begin his tour of duty at Bronx Narcotics at 1428 hours; his average commuting time from home was between 45-50 minutes, depending on traffic. He decided to go to Home Depot before work to purchase some items his electrician needed to install a generator at Respondent's home. According to Respondent, he needed to purchase "a startup module for the generator, the battery pack, I was instructed to buy numerous different cords, numerous different liquids, as well as specific hangers for the wires to be stored, as well as one of the items I was looking to purchase, was a vacuum cleaner and that was for my wife, our anniversary, I was giving that to her as a gift which was two weeks from the incident. Because I was working so much and everything going on at home, and I had no sleep, this was the only opportunity I had to purchase that stuff as well as numerous other things going on in my life at that time" (T. 97-98).

Respondent explained that before setting out for Home Depot, he and his wife had "a minor argument" because he "was leaving for work, there was stuff going on at home with the

babies, she needed assistance, I was leaving to go to work, I had to get this generator situation done because that was extremely important for us to have it running. We argued about the fact that I was doing that at the wrong time.” According to Respondent, he received numerous calls from his supervisor for work-related issues (T. 98).

Respondent testified that he was also supposed to “buy specific formula for my son, the premature baby which I was not able to find, so my wife was calling me, sending me text messages that I needed to find it. Prior to going to Home Depot, I stopped at CVS, I stopped at Walmart; neither store carried that specific formula, so she was getting frustrated thinking I wasn't doing that and go to two stores to do what I was supposed to do. Walmart and Home Depot are literally half a parking lot away from each other, so once I was unable to locate any of the items that I need, I went to Home Depot to pick up the stuff for the electrician that [was] coming the following morning as well as to make things right, I knew she wanted this vacuum, so I selected a vacuum to buy early, and I was going to give it to her two weeks later” (T. 98-99).

Respondent testified further that he was only in Home Depot for a short while because he was “pressed for time”; he recalled selecting “numerous” items and specifically recalled that there was one item he was unable to find, a “breaker” (T. 99). Respondent did not recall seeing any Dyson items bearing security devices on the packaging and did not see a security device on the Dyson vacuum package he placed in his cart; he denied selecting that particular package because it did not have a security device on it (T. 100). Respondent testified that he did not remember precisely how many items he selected that day but recalled that they included the following items: “[t]he vacuum, the battery pack, numerous extension cords, I selected numerous liquids for the generator that I purchased, oils, starting chemicals, what I was instructed to. Different hangers, I don't remember exactly what it was, but I was getting stuff pertaining to this

install" (T. 100-101). Respondent testified that he purchased these items at the direction of his electrician (T. 101).

Respondent claimed that as he moved through the store, he was in communication with his wife and one of his supervisors; he explained, "Like I testified earlier what was going through my head that day, the amount of stress I was under, dealing with numerous other things, it was very overwhelming worrying about a child at home, the fact I had to be at work within a short period of time, I was getting different assignments given to me via the phone. My mind was not there; I had tunnel vision, checked out through that exit, and my mind was completely elsewhere when I was at that line. When I was at the register, I was receiving phone calls, text messages. I ignored my wife at the moment because I knew it was just going to be yelling at me, and I didn't get the formula" (T. 102).

Respondent testified that when he went to the check-out, he "started scanning items. The entire time – we had earlier spoken about the beeping noises, the place was very busy that afternoon. I started scanning items, continued scanning, pointed at the items I had, and thought I scanned everything that I had selected; at no point did I want to steal anything. When I finished scanning, which I believe I scanned every item, I inserted my credit card; I believe I clicked credit, I waited for the receipt and started walking out" (T. 103). Respondent testified that he did not see the total dollar amount on the check-out monitor because "I wasn't paying attention to that. When [I] tell you that the check-out process that occurred was very fast, I was completely tunnel vision, like if you ever drove home and you're like, 'how did I do that,' it was one of those moments, I did not realize that in fact those items I thought I scanned I did not scan" (T. 103-104, 117).

When Respondent was asked whether he recalled pointing the scan gun at the Dyson vacuum, he answered, "I don't remember the exact process of the check-out. All I remember is I

was pointing and scanning; I don't recall looking at the screen much. I just remember scanning. Once I felt I had scanned everything, I inserted my card, and I was waiting for the receipt to be on my way" (T. 104-105). Respondent denied that he was experiencing any financial difficulties: "No financial problems, I had a million other issues going on, but financially I was able to pay for all the items I selected, I wanted to pay for them, I asked to pay for them," (T. 104).

Respondent testified that as he walked out of Home Depot, he received a call from his commanding officer concerning a work situation; it was then that Cox stopped him, informing him that he had not paid for some of the items in his cart. According to Respondent, he immediately looked at his receipt and saw that he had indeed not paid for some things. He claimed that he told Cox that he was embarrassed and asked to pay for the items; Cox supposedly told him not to worry and "just come to the back." Respondent testified that he again apologized and offered to pay for the items, at which point Cox asked him if he was a police officer. When Respondent answered that he was, Cox told him to follow him to the back (T. 105-106).

Respondent claimed that once he entered Cox's office, Cox "did his procedure," and another person "conducted some kind of receipt lookup"; Respondent again asked, "Is there any way we can make this stop? Can I please pay for this?" Cox supposedly said, "Don't worry about it, nothing was taken, I got the items back" (T. 106). Respondent persisted and asked whether there was someone he could speak to; Cox made a call to someone he identified as a supervisor (*Id.*, 134).

After the telephone conversation, Cox supposedly said to Respondent, "This is your lucky day," then gave him a form to sign that would bar Respondent from entering any Home Depot for three years. Respondent signed the document while Cox began filling out another

document, which Respondent did not see him complete. Cox then told Respondent that he could be on his way and escorted him to the parking lot. The items Respondent had paid for remained in his shopping cart, but the things "which I alleged didn't pay for he wouldn't let me pay for" remained in Cox's office (T. 107). According to Respondent, when he left Home Depot, he did not think he was in jeopardy of being prosecuted for petit larceny: Cox had told him he did not want Respondent arrested, and "[Cox] understood it was a mistake" (T. 107-108). Even though Respondent did not purchase three items from the list of things he was directed to buy by the electrician, he did not contact him to cancel the appointment for the next day (T. 127).

Respondent testified that he received a telephone call later that afternoon while he was on-duty from someone who identified themselves as an investigator from the New York State Police; in this call, the caller asked when Respondent could present himself for an interview regarding the incident at Home Depot he was involved in earlier in the day. Respondent advised the caller that he was at work and would be unable to come in right away. Respondent suggested that they notify him of a time to come in and that he would do so. According to Respondent, the caller told him that someone else would be contacting him to set up a time for an interview. Respondent testified that while he did not believe he was under criminal investigation at that time, he immediately contacted a union delegate. He testified further that at that point, he had no intention of making a notification to this Department because he believed nothing had happened which would have required such a report. Respondent testified that 3-3 ½ hours later, he was directed by his supervisor to return to the command to speak with a Duty Captain regarding the incident (T. 108-110, 127-129, 138).

Donald Cox testified that when he stopped Respondent outside the check-out area, he said, "My name is Donald; I work loss prevention, and I need to ask you about the merchandise you have" (T. 24, 64). Respondent replied, "I could get in trouble" (*Id.*, 84). Cox testified that

he suspected Respondent might be on either parole or probation; when he asked Respondent if he was, Respondent answered, "No."¹ (*Id.*). Cox then asked Respondent if he was a police officer, to which Respondent nodded his head and said, "Yes" (*Id.*). Cox then told Respondent, "Let's not make a big deal of this. Home Depot has a policy that I have to follow. If you come with me back to the store, we have to do paperwork, recover the merchandise and take it from there" (T. 26). They then began walking side by side toward Cox's office; according to Cox, Respondent asked, "What's going to happen?" but did not say much else (T. 27). On cross-examination, Cox stated that Respondent neither claimed that he had actually paid for the questioned items when challenged nor did he ever offer to pay for the things which he did not scan or pay for² (T. 64-65, 85).

Once Cox and Respondent arrived at the Asset Protection office, he entered with Respondent. James Mandato, an assistant manager, stood by the door to witness the interview (T. 28). Cox completed an apprehension report and reviewed a receipt for the recovered items; Cox also had Respondent sign a trespass form (T. 29-31; Dept. Exs. 2, 3, 4).

Cox testified that during this meeting, Respondent asked him "if there was anything we can do or someone else he could speak to" (T. 32). Cox replied that he would contact his supervisor, Christine LeRose, and find out "if there was anything we [could] do for him" (*Id.*) Cox thought he observed a police identification card when Respondent opened his wallet, but Respondent never presented it to him (T. 33).

Cox testified that he stepped out of the office and had a telephone conversation with LeRose, in which he explained to her that he had "a subject enter the check-out area, there was merchandise that wasn't paid for, I stopped him, spoke to him about the situation, he advised me

¹ Respondent claimed he had no recollection of whether Cox asked this question (T. 123).

² As set forth above, Respondent disputed Cox's testimony that he never offered to pay for the questioned items (T. 104-, 106, 125).

that he was an NYPD police officer and he couldn't get in trouble." LeRose then asked him "how [Respondent] was in the office." Cox told LeRose that, "he was completely professional, courteous, very nice, I told her the dollar amount of the merchandise." Cox also told LeRose, "I believe he's a police officer and he is adamant that he could get in trouble and what, if anything, what we can do." LeRose told Cox to "have [Respondent] fill out a trespass form banning him from Home Depot for three years" (T. 34-35).

Cox testified that when he re-entered his office, he told Respondent, "It was his lucky day." After Cox explained to Respondent that he would need to sign a trespass form that would bar him from entering a Home Depot for three years, Respondent seemed hesitant and stated that he "didn't want a paper trail."³ (T. 35-36, 66, 84). Cox replied that he could not dispose of the paperwork and that there was "no way to get rid of it" since his supervisor reviewed his cases (T. 37). Respondent completed the form and reiterated that he "couldn't have a paper trail" (*Id.*). Cox told Respondent for the second time that if his supervisor reviewed the files and did not see the paperwork, especially since she now knew the case, that he could lose his job (*Id.*). Cox then escorted Respondent from the premises (*Id.*).

I credit the testimony of David Cox as logical, corroborated by other independent evidence in the case, and forthright.

In contrast, I find the testimony of Respondent to be embellished and implausible. I note that, as a matter of law, Respondent is an interested witness. Having had the opportunity to witness Respondent's testimony first-hand, my credibility findings are based upon its content, as well as his demeanor. As outlined in detail below, I find Respondent's post-incident behavior, combined with his in-court testimony, to be rife with self-interest and, therefore, unpersuasive.

³ Respondent denied that he ever used the term "paper trail" during his meeting with Cox (T. 125).

Specification 1: Theft of Property

I find the Department Advocate has met his burden of proof by a preponderance of the credible, relevant evidence that Respondent wrongfully stole property from Home Depot.

It is undisputed that Respondent attempted to leave Home Depot with four items that he did not pay for (1) a Dyson Cyclone V10 Motorhead cordless stick vacuum cleaner, list price \$349.00; (2) a Dewalt 1400 amp digital power station, list price \$199.00; (3) a Husky 50-foot extension cord, list price \$19.88; and (4) a Gen25 25 foot 30 amp Ridgid Gen cord, list price \$69.97. Donald Cox personally observed Respondent attempt to leave Home Depot with the specified items; the security camera recording entered in evidence as Department Exhibit 1 corroborates his observation of Respondent at the self-service check-out.

In my review of Department Exhibit 1, I note that Respondent picked up the package containing the Dewalt battery pack while holding the scan gun in his left hand; he turns it over several times but he does not appear to scan it. At no point during the checkout process did I observe Respondent touch the package containing the Dyson vacuum, let alone scan it.

Respondent has argued that what might appear to be theft was actually an absent-minded, good-faith error, and he lacked the intent to take the specified property. I find the evidence presented in support of his defense to be dubious.

First, Respondent's assertion that he was severely distracted because his wife was angry with him strikes the Tribunal as a plea for sympathy rather than probative evidence. The only evidence of the content of the telephone calls and text messages he claims came from his wife is Respondent himself. As previously noted above, because Respondent has a significant interest in the outcome of this litigation, the Tribunal must carefully scrutinize any self-serving assertions of fact. While the occasional disappointment of one spouse in the other spouse's performance of marital duties does not require a speculative leap, such disappointment, if it indeed existed in this

case, is a far cry from being involved in an in-person, real-time distraction at the time Respondent attempted to carry out his tasking (*compare, Disciplinary Case No. 2013-10728 [July 27, 2015]*)[Respondent found Not Guilty of petit larceny. The respondent was accused of failing to scan a package of fish at a self-service checkout, while scanning approximately ten other items totaling \$117.00. At the time she was checking out, respondent was accompanied by her two children, who were running back and forth, climbing on the shopping cart and chasing each other. The security video showed that one of her children was no longer wearing the pink coat she had on when she entered the store. After respondent inserted a credit card, and paid for her purchases, she attempted to leave the store. The Loss Prevention associate challenged her on her way out, claiming that she had failed to pay for an item, then lifted a pink coat from the shopping cart, which concealed a single package of fish. The Trial Commissioner credited respondent's straightforward, plausible account the she did not see the fish because it was hidden under the jacket that her young daughter took off and threw on top of it]).

Second, Respondent's claim that an additional source of his distraction was several calls he fielded from his supervisors as he attempted to complete his shopping does require a speculative leap. It seems odd that a supervisor would essentially be hectoring Respondent on job-related issues if Respondent would have, as he testified, reported for duty in a matter of an hour or two. It makes more sense that such a supervisor would choose to discuss such issues with Respondent when he had access to his investigative case files; another benefit of waiting until Respondent reported for duty was that the supervisor could command Respondent's undivided attention.

Third, Respondent's assertion that he never looked at the running list of his purchases, which the check-out monitor displayed, or the total price of his purchases, strains credulity.

Common sense suggests that most customers would check the price of their purchases to ensure that they were not overcharged, in particular when purchasing high-priced items.

Fourth, while Respondent claimed to have been so distracted that he never even looked at the check-out monitor to audit the items he believed he had scanned or to have looked at the total cost of the things he thought he had purchased, he supposedly recalled the items the electrician had instructed him to purchase without resort to a list (T. 113-114, 119). This assertion is in conflict with his claim that his distraction rose to the level of his "mind not [being] there." In addition, the Dyson vacuum cleaner was the most expensive item he placed in his cart and calculated to assuage the disappointment of his wife. Surely, the motivation behind purchasing that item alone would have been likely to focus his attention sufficiently to look at the price as he scanned it, as he claimed he believed he did.

Fifth, Respondent did not explain why he selected a Dyson vacuum package, which did not have a security device on it, when there were two other packages. When he first observed Respondent, Donald Cox testified that he saw him standing in front of three Dyson vacuum packages, and Respondent selected the only one which did not have a security device on it. As an adult, let alone a police officer, Respondent was undoubtedly aware of the existence of anti-theft measures taken by retailers. He testified that he was explicitly aware that Home Depot employed security measures, including surveillance cameras, and that he had shopped at that particular Home Depot on several previous occasions. Such unexplained behavior permits the inference that Respondent intentionally selected a package without a security device on it with the specific intent of evading the anti-theft devices at the store entrance.

Finally, Respondent's behavior, once confronted by Cox, evinces persuasive evidence of consciousness of guilt. Under New York law, "evidence of post-crime conduct that may in the context of a particular case evince a [Respondent's] consciousness of guilt of the offense with

which [the Respondent] is charged is admissible. A false alibi or explanation for one's actions, intimidation of a witness, destruction or concealment of evidence, or flight may be evidence of consciousness of guilt. A [respondent] may introduce evidence of an innocent explanation for the conduct to rebut the inference of 'consciousness of guilt.' A jury should be advised of the limited probative value of 'consciousness of guilt evidence and must be so advised upon request of the [respondent]" (*Guide to NY Evid.*, rule 4.20.3, Consciousness of Guilt; *People v. Bennet*, 79 NY2d 464, 469-470 [1992]). The Court of Appeals refined its evaluation of the principle, ruling that its probative weight is "highly dependent upon the facts of each particular case" (*People v. Cintron*, 95 NY2d 329, 332-333 [2000]; see *Criminal Jury Instructions 2nd*, General Applicability, Consciousness of Guilt).

Respondent's first words to David Cox were, "I can't get in trouble." He did not express umbrage that he was being accused of a crime he did not commit; he did not indignantly proffer his receipt; he did not express self-doubt and confess that he was almost sure that he paid for everything but sought to scrutinize his receipt in the hope that it would exonerate him. Had Respondent, or any other person, truly believed that he had paid for all the items in his cart, he would have proffered the best proof of that purchase: his check-out receipt. That he did not do so, in combination with his unsolicited declaration to Cox, strongly suggests that he was then, and there, aware that his receipt did not reflect that he had paid for the four items. Even in his testimony, Respondent claims he checked the receipt and only then discovered the items he had not scanned. I draw an inference from Respondent's behavior that his assertion was a hedge against a full-throated assertion of innocence, which he knew at the time would not have been true.

I further reject Respondent's testimony that he offered to pay for the items he did not scan on three separate occasions. I find Cox's testimony that he never offered to pay for the items more plausible.

Once he accompanied Cox to the Asset Protection office, Respondent's conduct appears to have been a desperate attempt to conceal his misconduct, further evidence that he was aware that he had done something wrong. His statement, "I don't want to create a paper trail," which he made to David Cox, can reasonably be interpreted as a desire to avoid any ability of this Department to become aware of his misconduct independently. Even after being advised that the store would not prosecute, Respondent repeated this statement; such persistence in advancing the issue seems to reveal a desire to bury any evidence of the interaction.

For all of the preceding reasons, I am compelled to reject Respondent's defense and find him Guilty of Specification 1.

Specification 3: Possession of Stolen Property

I find the Department Advocate has met his burden of proof by a preponderance of the credible, relevant evidence that Respondent wrongfully possessed stolen property. I incorporate my analysis and findings under Specification 1.

The evidence in the record supports a finding that Respondent was aware that he had stolen four items from Home Depot and had no right to possess them. I have previously rejected Respondent's claim that his theft of the items was, in fact, an innocent mistake.

Based upon the preceding, I find Respondent Guilty of Specification 3.

Specification 2: Failure to Notify Internal Affairs

I find that the Department Advocate has met his burden of proof by a preponderance of the relevant, credible evidence that Respondent failed to notify the Internal Affairs Bureau that he was the subject of a criminal investigation by the New York State Police.

Patrol Guide procedure 207-21 imposes an unambiguous, “absolute” duty upon Members of Service to report misconduct:

Upon observing, or becoming aware of corruption or other misconduct or upon receiving an allegation of corruption or other misconduct involving a member of the service:

1. Telephone Internal Affairs Bureau, Command Center...
 - a. Give preliminary facts.
 - b. Identify self or, if opting to remain anonymous, obtain Confidential Identification Number from the Command center investigator.
 - c. Furnish details of corruption or other misconduct.

(P.G. 207 21).

By his own admission, Respondent did not contact the Internal Affairs Bureau when he received the call from the State Police investigator: he hung up and called his union delegate. His claim that he was waiting for instructions from the delegate on how to proceed further is unavailing. P.G. 207-21 places the responsibility for a notification upon the Member of Service concerned, not a third party.

Moreover, Respondent testified that he had no intention of calling Internal Affairs because he felt nothing had occurred which he was bound to report. This assertion is incredible on its face. When a police officer receives an unsolicited call from the State Police requesting an interview regarding an incident in which he was involved earlier in the day, he should have known immediately that he was in jeopardy of facing Departmental discipline or criminal prosecution.

While both of Respondent’s assertions were mistaken, his misapprehension of his responsibilities under the Patrol Guide is not a defense to the charge.

Based upon the preceding, I find Respondent Guilty of Specification 2.

PENALTY

In order to determine appropriate penalties, the Tribunal, guided by the Department Disciplinary System Penalty Guidelines (“Disciplinary Guidelines”), considered all relevant facts

and circumstances, including any aggravating and mitigating factors established in the record.

Respondent's employment record was also examined (*see* 38 RCNY § 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on July 6, 2011, has been found guilty of conduct, which would constitute the crime of Petit Larceny, Penal Law Section 155.25, and Criminal Possession of Stolen Property in the Fifth Degree, under Penal Law Section 165.40. The presumptive penalty for each of those offenses is termination. The mitigated penalty for each offense is forced separation from the Department. Respondent has also been found guilty of failing to notify the Internal Affairs Bureau that he was the subject of a criminal investigation. The presumptive penalty for that offense is not specified in the Disciplinary Guidelines. The most analogous penalty is for failing to notify the Department of involvement in a police incident, which is five days.

While the Respondent's state of mind is potentially a mitigating factor, in this case, deciding whether such mitigation is present is a complicated question. Counsel for Respondent argued that Respondent did not intend to steal property. I interpret that to mean that he lacked the specific intent to take goods without paying for them. Respondent, in his testimony, asserted that he was distracted and did not check the visual display at the self-service check-out for the number of items he purchased, the price of each item, or the total purchase price. In finding him guilty of Specifications 1 and 3, I have rejected this proffered defense.

In committing petit larceny, Respondent committed a common-law offense against the People of the State of New York. While the property owner offered Respondent the opportunity to avoid criminal prosecution by voluntarily agreeing to barment for three years, such generosity

does not erase the gravamen of his misconduct. Ordinary civilians who commit such an offense are subject to summary arrest, prosecution, and possible incarceration.

According to the credible testimony of David Cox, at no point during their encounter did he offer to pay for the goods he failed to scan. It would have been reasonable for any person who inadvertently failed to scan an item at a check-out machine to immediately offer to do so upon being alerted to their omission, not that such an offer would vitiate the crime. It is noteworthy that Respondent's first thought was to conceal his status as a member of law enforcement, as well as the discovery of his misconduct. When Cox confronted him, he did not identify himself as a Member of Service but answered only the questions posed to him. Once Cox followed his procedure to document the theft, Respondent was anxious to speak with someone in a position of authority who could "make it disappear." After receiving the extraordinary benefit of Cox's manager's voluntary barment as an alternative to criminal prosecution, Respondent still sought to avoid "leaving a paper trail."

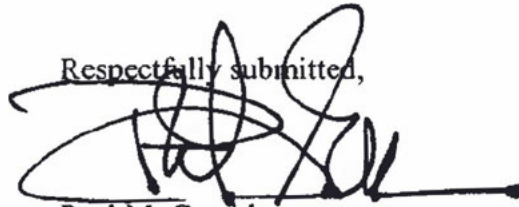
Respondent contradicted Cox's testimony by asserting that he repeatedly offered to pay for the items he "failed" to scan. He further stated that he did not remember telling Cox that he "couldn't have a paper trail." Respondent presented no credible evidence suggesting that Cox had a personal animus against Respondent or that his testimony was otherwise unreliable.

When an investigator from the State Police contacted Respondent, his next call was to a union delegate rather than to Internal Affairs, as the Patrol Guide requires. Although Respondent testified that he believed his delegate would make the appropriate notifications, the Patrol Guide imposes that duty upon Respondent, not his delegate. While it is true that he eventually spoke with a Duty Captain, it was undoubtedly because the captain had been directed to investigate after a party other than Respondent made this Department aware of the State Police investigation.

In no way can this post-offense behavior be characterized as acceptance of responsibility, let alone remorse. For these reasons, I find that there is no evidence of mitigation in the record.

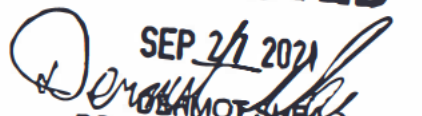
Accordingly, I recommend that, pursuant to Section 14-115 of the Administrative Code of the City of New York, Respondent be DISMISSED from the Department.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Paul M. Gamble', written over a horizontal line.

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

SEP 21 2021

DERICK M. SMITH
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER ROSTISLAV KIPERVASER
TAX REGISTRY NO. 950687
DISCIPLINARY CASE NO. 2020-22653

Respondent was appointed to the Department on July 6, 2011. On his last three performance evaluations, Respondent received 4.5 overall ratings of "Extremely Competent/Highly Competent" in 2016, 2018 and 2019. He has been awarded two medals for Meritorious Police Duty and eight medals for Excellent Police Duty.

Respondent has no disciplinary record. In connection with the instant matter, Respondent was suspended without pay from September 4, to October 4, 2020.

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials